



## DePaul Law Review

---

Volume 3  
Issue 2 *Spring-Summer 1954*

Article 12

---

## Contracts - Commencement of Bidding at Auction "Without Reserve" Precludes Withdrawal of Property

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

DePaul College of Law, *Contracts - Commencement of Bidding at Auction "Without Reserve" Precludes Withdrawal of Property*, 3 DePaul L. Rev. 280 (1954)

Available at: <https://via.library.depaul.edu/law-review/vol3/iss2/12>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapiientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapiientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

considered constitutional.<sup>25</sup> No charge of preference was made in this case. In the famous *McCollum* case,<sup>26</sup> the Supreme Court of Illinois held the program involving the use of school premises for sectarian instruction to be constitutional. This decision was reversed by the United States Supreme Court.<sup>27</sup> As previously indicated, the use of school premises for a purpose considered to be sectarian is almost universally held unconstitutional. Many states have constitutional provisions to this effect,<sup>28</sup> and most others reach it by judicial interpretation. The material to be distributed in the instant case appears to have been sectarian, and as the school board was cooperating in its distribution, allowing the use of school buildings for the purpose, obtaining permission from parents, and otherwise aiding the project, the effect contemplated amounted to a preference by the school board of one religious belief over others. The requirement that the state refrain from giving preference to one religious belief over others is thus met in New Jersey by refusing the aid of the school system in the distribution of sectarian matter to all. While this would seem to keep the school system and the state neutral in the contest among sectarian creeds, it also seems to grant a preference to the opponents of religion over those who favor it, which does not seem necessary in order to comply with the Constitution. The requirement that the state remain neutral in the contest among various religions does not require that the state adopt an antagonistic attitude toward religion in general.

### CONTRACTS—COMMENCEMENT OF BIDDING AT AUCTION “WITHOUT RESERVE” PRECLUDES WITHDRAWAL OF PROPERTY

The defendant, who was part owner of a large estate which included personalty and realty, employed an auctioneer to conduct its sale. The auctioneer and the defendant prepared an advertisement which stated that the property was to be sold “without reserve.” This advertisement was published in a daily newspaper and in brochures which were distributed at the commencement of the auction. Prior to the sale the auctioneer repeated the terms of the advertisement. The defendant and his attorney were present but made no objection or public correction. The bidding continued until the plaintiff bid \$41,000, which the auctioneer acknowledged. Before another bid was made, the unsatisfied defendant

<sup>25</sup> *People ex rel. Latimer v. Board of Education*, 394 Ill. 228, 68 N.E. 2d 305 (1947).

<sup>26</sup> *People ex rel. McCollum v. Board of Education*, 396 Ill. 14, 71 N.E. 2d 161 (1947).

<sup>27</sup> 333 U.S. 203 (1948).

<sup>28</sup> See e.g., Ill. Const., note 21 *supra*; N.J. Const., note 1 *supra*.

stated that the property would not be sold for less than \$100,000, and ordered the auction stopped, discharging the auctioneer. The plaintiff brought an action for specific performance. He contended that a contract of sale arose through the auctioneer acting as the owner's agent. The Supreme Court of Wisconsin affirmed the decree of specific performance and held that since the auction was "without reserve," the owner could not withdraw the property after the first bid was made. *Zubak v. Rose*, 264 Wis. 286, 58 N.W. 2d 693 (1953).

The Supreme Court of Wisconsin, in this case, one of first impression, has determined a question which was previously uncontested both in the United States and in England. As a basis for its decision the court applied the Wisconsin statute<sup>1</sup> governing sales and auctions. This statute corresponds to section 21 (2) of the Uniform Sales Act, which states:

A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid, and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

Since *Payne v. Cave*,<sup>2</sup> it is the settled rule that the bidder may retract his bid until such time as the auctioneer has accepted it by the fall of his hammer, or other act tantamount to an acceptance. The reason is that the bid is nothing more than an offer to contract, revocable by the offeror prior to the auctioneer's perfecting the contract by his acceptance.

Similarly, the auctioneer can ordinarily withdraw the goods from sale,<sup>3</sup> for one who enters into preliminary negotiations and invites offers, in no way binds himself, should an offer be made, unless he accepts the offer. However, should the highly technical words "without reserve" be used in the announcement of the auction, the Sales Act, although still allowing the bidder the right to retract his bid before there is an acceptance by the fall of the hammer, precludes the auctioneer from his right to withdraw the goods from sale. The theory upon which a contract appears to arise is that the auctioneer, in placing the goods for sale at an auction "without reserve," is the offeror, and each bid is an acceptance from the persons of the assemblage; each successive bidder therefore accepts the offer on the condition that no higher bid is made.

If the bidder is allowed to retract his bid at any time before the auctioneer's acceptance, the auctioneer is bound, while the bidder is not. The problem involved is not new in the textbooks and treatises on sales at

<sup>1</sup> Wis. Stat. (1951) § 121.21(2).

<sup>2</sup> 3 T.R. 148, 100 E.R. 502 (K.B., 1789).

<sup>3</sup> *Freeman v. Poole*, 37 R.I. 489, 93 Atl. 786, 794 (1915). "... the auctioneer, as agent of the ... (owner) ... was at liberty to withdraw the land from sale in as much as the auction had not been announced to be without reserve."

auctions, but court decisions are few and they discuss the problem only by way of dicta.

Several English cases have mentioned the effect of the use of "without reserve" in announcements of auctions.<sup>4</sup> The leading English case of *Warlow v. Harrison*<sup>5</sup> discussed the problem. The rules it set forth have been adopted by statutes in the several states.<sup>6</sup> In that case, an auction was advertised to be "without reserve." A bidder, realizing that his opponent bidder was actually the true owner of the horse being auctioned, refused to bid further. The auctioneer "knocked the horse down" to the owner and the bidder sued the auctioneer for breach of contract. The plaintiff claimed that upon commencement of bidding at an auction advertised to be "without reserve," the auctioneer could not remove the goods from sale or fail to "knock down" the goods to the highest bidder. Although the case was decided on a procedural point, by way of dictum, the court said, "Neither vendor nor any person in his behalf shall bid at the auction, and that property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not."<sup>7</sup> The court also cited *Robinson v. Wall*,<sup>8</sup> a case in Chancery where the Lord Chancellor said:

When a property is offered for sale without reserve, the meaning, and the only meaning that can be attached to it, is that, of the bidders—the public—who choose to attend the sale, whoever bids the highest shall be the purchaser; that the biddings shall be left to themselves, and that there shall be no bidding on the part of the vendor. . . . I consider, therefore, the term "without reserve" to exclude any interference on the part of the vendor . . . which can, under any circumstances, affect the right of the highest bidder to have the property knocked down to him and *that*, without reference to the amount to which that highest bidding shall go.<sup>9</sup>

Several later cases,<sup>10</sup> cited *Warlow v. Harrison*<sup>11</sup> but, because of the peculiar facts of each case, no necessity arose to expressly affirm or renounce the doctrine suggested by the plaintiff. Each case, however, discussed, and apparently approved the doctrine.

<sup>4</sup> *Harris v. Nickerson*, L.R. 8 Q.B. 286 (1873); *Spencer v. Harding*, L.R. 5 C.P. 561 (1870); *Mainprice v. Westley*, 6 B. & S. 420, 122 E.R. 1250 (Q.B., 1865); *Warlow v. Harrison*, 1 El. & El. 295, 120 E.R. 920 (1858); *Robinson v. Wall*, 2 Ph. 372, 41 E.R. 986 (Ch., 1847); *Thornett v. Haines*, 15 M. & W. 367, 153 E.R. 892 (Ex., 1846).

<sup>5</sup> 1 El. & El. 295, 120 E.R. 920 (Q.B., 1858).

<sup>6</sup> Cal. Civil Code (Deering, 1949) § 1796; Mont. Rev. Code (1947) § 66-217; N.D. Rev. Code (1943) § 51-0122; S. D. Code (1939) § 54.0121.

<sup>7</sup> *Warlow v. Harrison*, 1 El. & El. 295, 120 E.R. 920 (Q.B., 1858).

<sup>8</sup> 2 Ph. 372, 41 E.R. 986 (Ch., 1847).

<sup>9</sup> *Ibid.*, at 375 and 988.

<sup>10</sup> *Harris v. Nickerson*, L.R. 8 Q.B. 286 (1873); *Spencer v. Harding*, L.R. 5 C.P. 561 (1870); *Mainprice v. Westley*, 6 B. & S. 420, 122 E.R. 1250 (Q.B., 1865).

<sup>11</sup> 1 El. & El. 295, 120 E.R. 920 (Q.B., 1858).

When the English Sale of Goods Act<sup>12</sup> was adopted in 1893 as a codification of the common law relating to the sales of goods, the doctrine of *Payne v. Cave*<sup>13</sup> was expressly incorporated, but no mention was made of the auctioneer's right to withdraw goods at auctions advertised to be "without reserve." The absence of such reference does not of itself establish that bidders at auctions "without reserve" have the identical rights of bidders at auctions not so advertised. This fact is supported by dicta in *Johnston v. Boyes*,<sup>14</sup> and other cases<sup>15</sup> which cited *Warlow v. Harrison*<sup>16</sup> with approval. On the contrary, the English Sales Act expressly states that all rules of common law including the Law Merchant, not inconsistent with the Act, shall continue to apply to contracts for the sale of goods.<sup>17</sup> Thus, lacking express disapproval, the rule of *Warlow v. Harrison*<sup>18</sup> still prevails in England.

In the United States, the rule of *Warlow v. Harrison*<sup>19</sup> was apparently approved in the proposed 1862 draft of the Civil Code of New York. Its section 718 cited *Warlow v. Harrison* and stated:

If an auctioneer having authority to do so, has publicly announced that the sale will be without reserve, or has made any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and upon such a sale bids by the seller or any agent for him are void.

This code was never adopted in New York, but this section has been the basis for similar sections in the statutes of California, North Dakota, South Dakota and Montana.<sup>20</sup> It was also incorporated into the Uniform Sales Act, section 21, a codification of the American common law relating to the sale of goods, proposed in 1906, and now adopted by some 37 jurisdictions.<sup>21</sup> Although from a legislative view, the rule of *Warlow v. Harrison* is firmly established in the United States, no judicial adoption existed until the instant case. The former "bookrule" conceived in dicta by the

<sup>12</sup> 56 & 57 Victoria, c. 71, § 58 (1894).

<sup>13</sup> 3 T.R. 148, 100 E.R. 502 (K.B., 1789).

<sup>14</sup> L.R. 2 Ch. 73 (1899).

<sup>15</sup> *McManus v. Fortescue*, [1907] 2 K.B. 1; *Rainbow v. Hawkins*, [1904] 2 K.B. 322.

<sup>16</sup> 1 El. & El. 295, 120 E.R. 920 (Q.B., 1858).

<sup>17</sup> Sale of Goods Act, 56 & 57 Vict., c. 71, § 61(2) (1894).

<sup>18</sup> 1 El. & El. 295, 120 E.R. 920 (Q.B., 1858).

<sup>19</sup> *Ibid.*

<sup>20</sup> Statutes cited note 6 *supra*.

<sup>21</sup> Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

English case of *Warlow v. Harrison* has been converted to stare decisis through the judicial legitimization of the instant case. Thus, the phrase, "without reserve," is of great legal significance, and must be treated with due respect by both the auctioneer and the owner.

The right of the bidder to retract his bid still remains, up to the moment the hammer falls. But, there is some possibility that the bidder, too, may be prevented from retracting his bid should an auction be advertised "without reserve." The 1952 "Official Draft" of the Uniform Commercial Code, being prepared under the guidance of the National Conference of Commissioners of Uniform State Laws, provides, in section 2-328, that "in an auction without reserve, the goods cannot be withdrawn nor a bid retracted." Similarly in the editorial comment following the above section it is stated: "The present section changes the prior rule by prohibiting the withdrawal of bids as well as of the goods in auctions 'without reserve.'" This legislative provision would have the effect of interpreting the act of placing goods for sale at an auction advertised to be "without reserve," as constituting an irrevocable offer, as in the instant case, which is immediately perfected into a contract of sale upon the receipt of the highest bid, which may not be withdrawn.

#### DOMESTIC RELATIONS—IMPOTENCY AS GROUND FOR ANNULMENT

The plaintiff and defendant had been married and subsequently divorced by a decree of the Superior Court of Cook County, Illinois, in 1947. This decree gave plaintiff the custody of their minor son and also decreed alimony to be paid to her monthly until she either remarried or died, whichever occurred first. In June, 1950, plaintiff was remarried and moved to California with her new husband. They cohabited there until the beginning of November, when they separated. Defendant ceased the alimony payments upon the remarriage and received no protest. In July of 1951, plaintiff filed for and was granted an annulment from her second husband in California, pursuant to the California statute allowing annulment of a marriage due to impotency of one of the parties.<sup>1</sup> As soon as the decree was entered making the marriage null and void, plaintiff demanded resumption of the alimony payments from the defendant, and continued these demands upon her return to Glencoe, Illinois, in August of 1951. When her demands were not heeded, plaintiff then petitioned for a rule requiring defendant to show cause why he should not be held in contempt of court for failure to pay alimony. This petition was dismissed in the Superior Court of Cook County. On appeal, the Illinois Appellate

<sup>1</sup> California Civil Code (Deering, 1949), § 82.